

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SCOTT C. SMITH,

Plaintiff,

v.

KAREN BRUNSON *et al.*,

Defendants.

Case No. C06-5712FDB

REPORT AND
RECOMMENDATION

**NOTED FOR:
March 2, 2007**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. The court has screened this complaint and recommends the complaint be dismissed prior to service for failure to state a claim.

Plaintiff has filed an amended complaint and names Julia Garrett and other members of the Washington State Indeterminate Sentence Review Board as defendants (Dkt. # 7). He no longer names Karen Brunson as a defendant (Dkt. # 7).

Plaintiff challenges the constitutionality of the Boards decisions on parolability and running his convictions consecutively (Dkt. # 7). The original complaint challenged the fact that he was still being held in prison.

Both complaints indirectly challenge the constitutionality of plaintiff's convictions (Dkt. # 5 and 7). Plaintiff attempts to avoid dismissal based on Heck by prefacing that he seeks future injunctive relief and is not

1 challenging his conviction itself (Dkt # 7).

2 DISCUSSION

3 When a complaint fails to state a claim, or contains a complete defense to the action on its face, the
 4 court may dismiss an *in forma pauperis* complaint before service of process under 28 U.S.C. § 1915(e).
 5 Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing* Franklin v. Murphy, 745 F.2d 1221, 1228 (9th
 6 Cir. 1984)). In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct
 7 complained of was committed by a person acting under color of state law and that (2) the conduct deprived
 8 a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt
 9 v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327
 10 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements
 11 are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020
 12 (1986).

13 When a person confined by the state is challenging the very fact or duration of his physical
 14 imprisonment, and the relief he seeks will determine that he is or was entitled to immediate release or a
 15 speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Preiser v.
 16 Rodriguez, 411 U.S. 475, 500 (1973). In June 1994, the United States Supreme Court held that "[e]ven a
 17 prisoner who has fully exhausted available state remedies **has no cause of action under § 1983 unless**
 18 **and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of**
 19 **a writ of habeas corpus.**" Heck v. Humphrey, 512 U.S. 477, 487 (1994)(emphasis added). The court
 20 added:

21 Under our analysis the statute of limitations poses no difficulty while the state challenges are
 22 being pursued, since the § 1983 claim has not yet arisen. . . . [A] § 1983 cause of action for
 23 damages attributable to an unconstitutional conviction or sentence does not accrue until the
 24 conviction or sentence has been invalidated.
 25 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be made
 26 based upon whether 'the nature of the challenge to the procedures [is] such as necessarily to imply the
 27 invalidity of the judgment.' *Id.* If the court concludes that the challenge would necessarily imply the
 28 invalidity of the judgment or continuing confinement, then the challenge must be brought as a petition for a
 writ of habeas corpus, not under § 1983." Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir.1997)
 (*quoting* Edwards v. Balisok, 520 U.S. 641 (1997)). The complaint fails to state a cause of action under 42

1 U.S.C. § 1983.

2 Here, plaintiff alleges the parole board considered improper information and he is being improperly
3 held. Were plaintiff to prevail, the decision would call into question the propriety of his current
4 incarceration. Plaintiff must proceed in habeas corpus.

5 CONCLUSION

6 Plaintiff's action fails to state a claim as a matter of law. The action should be **DISMISSED**
7 **WITHOUT PREJUDICE**. A proposed order accompanies this report and recommendation.

8 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
9 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ.
10 P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v
11 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to
12 set the matter for consideration on **March 2, 2007**, as noted in the caption.

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14 DATED this 5 day of February, 2007.

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16 /S/ J. Kelley Arnold
17 J. Kelley Arnold
18 United States Magistrate Judge
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